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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

WINSTON FINANCIAL GROUP, INC.,	
Plaintiff and Respondent,	G041206
v.	(Super. Ct. No. 815181)
RICHARD SPENCER,	O P I N I O N
Defendant and Appellant.	

Appeal from an order of the Superior Court of Orange County, Frederick P. Horn, Judge. Affirmed.

Law Office of Norma Ann Dawson and Norma Ann Dawson for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Richard Spencer appeals from an order that denied a motion to set aside a judgment against him in this collection action by Winston Financial Group, Inc. (Winston). The motion was brought after an assignee of the judgment, Court Services LLC (Court Services) levied on Spencer's bank account. Spencer argues there was sufficient evidence to find he was never served with the summons and complaint, the judgment is void, and the motion was timely. But the trial court found service was made, and the evidence supports that finding, so we affirm.

FACTS

Winston commenced this action against Spencer and others in 1999. A filed proof of service stated Spencer was personally served at 7901 Duchess Drive, Apartment 16, Whittier, on October 20, 1999. He failed to answer. A request for entry of default was filed, accompanied by proof of service by mail at the same address. Default was entered, and a motion for summary adjudication was granted. On October 11, 2000, judgment was entered in the amount of $24,585.44, later modified to add costs ($1,254.22) and attorney fees ($13,985). Nothing in the record indicates Spencer was served with any papers subsequent to the request for entry of default. In 2001, the judgment was assigned to Court Services.

In February 2008, Spencer was notified by his bank that funds in an account had been levied upon pursuant to a writ of execution to satisfy the judgment. In July 2008, he moved to set aside the default and judgment. The motion sought statutory relief on the ground Spencer never received actual notice in time to defend the action (Code Civ. Proc., § 473.5, subd. (a)), and relief under the court's inherent equitable power to set aside a judgment for extrinsic fraud or mistake.

In a supporting declaration, Spencer stated he was not personally served at 7901 Duchess Drive, Apartment 16, Whittier, on October 20, 1999, or any other date. He denied living at the Whittier address at that time, saying he had moved out in August 1999 to room with a friend (Rudy Lara) at 8333 Fifth Avenue, Downey, where he resided

until April 2000. To establish the Downey residence, Spencer claimed his truck was vandalized there on October 18, 1999, and he had reported the incident to the police. Attached was what he characterized as a copy of a print out from a police computer screen, which shows such a report on the date claimed, with Spencer's address listed as 8333 Fifth Avenue, Downey.

Spencer offered additional declarations from several other individuals. The Downey roommate (Lara) declared Spencer lived there from August 1999 to April 2000. A contractor declared Spencer had hired him to design and build a custom home entertainment center in August 1999. To do this, he first inspected Spencer's home at the Downey address, then delivered the finished product there in September 1999. An invoice to Spencer at the Downey address was attached. Rebecca Luna, the mother of Spencer's son, declared they shared custody of the child. Between August 1999 and April 2000, she dropped off and picked up the child at the Downey address, which was Spencer's "personal residence" and the place where he and the child resided.

Richard Jorgensen, the attorney who brought the motion, declared he had represented Spencer in 10 actions since 1999. He claimed it was Spencer's custom to always call immediately when sued and promptly forward the papers received. It would be "very unusual and surprising" for Spencer not to do so, and Jorgensen said he never received any papers in this matter. In a second declaration, Jorgensen said he had contacted the manager of the Downey apartment where Spencer had lived. He attached a letter from the apartment manager that stated Spencer and Lara had signed a one-year lease for an apartment at 8333 5th Street, Downey "sometime between 1999 and 2000."

In opposition, Court Services offered a declaration from the process server who signed the proof of service (Allen Houser). Houser declared he had no personal recollection of serving Spencer, but he had reviewed his records and based on them, he had served Spencer on October 20, 1999. Houser said he kept a daily diary in 1999, in which he recorded his activity after each stop through the course of the day. Each entry

consisted of the time service was attempted, the name of the party, city, and mileage on his vehicle. According to the diary entries for the dates in question, attached, Houser attempted service on October 18 and October 19, 1999, and successfully served Spencer on October 20, 1999, at 8:34 p.m. Houser also reviewed his invoice for this job, which he said he generally sent a day or two after completing service. A copy was attached. The October 20, 1999 invoice stated Spencer was served on that date.

The trial judge found Spencer had been served with the summons and complaint. As he put it, "the court is not persuaded . . . [Spencer] was not served as indicated by the proof of service." In explaining the decision, the court said it was troubled by the absence of any documentary evidence Spencer had lived at the Downey address, or that he had no contact with the Whittier address after August 1999. Other than the vandalism report, the court said, "there's no other paper trail or documents to show where he lived, what address changes took place, where he lived previously, where he lived after . . . that sort of thing. That would have been helpful . . . in determining credibility. . . . [W]e have a proof of service by a process server that looks pretty valid to the court and there's no statement [by] Mr. Spencer that he had no further contact with that Whittier address. . . . The fact that he was served there isn't necessarily startling [even though] [h]e was living someplace else." The court also found the motion for statutory relief (Code Civ. Proc., § 473.5, subd. (a)) was untimely as not brought within two years of entry of judgment, and there was no extrinsic fraud or mistake that warranted relief. An order was entered denying the motion.

I

Spencer argues he offered substantial evidence of nonservice, so the judgment should be set aside. But that reflects a misunderstanding of the law.

To prevail on a substantial evidence challenge, an appellant must set out the contrary evidence and show why it was lacking. (*Nwosu v. Uba* (2004) 122 Cal.App.4th

1229, 1246.) It is not enough to reargue the favorable evidence, since an appellate court cannot reweigh the evidence and substitute its judgment for that of the fact finder.

Spencer cannot carry the day by arguing the trial court could have found he was never served. The court found there was service and the evidence supports that finding. The proof of service, supplemented by the process server's declaration in opposition to the motion, is ample evidence of service on Spencer. Since the evidence supports the finding Spencer was served with the summons and complaint in this action, the motion to set aside the judgment was properly denied.

Spencer argues the trial court did not "definitively" decide whether he was served, instead denying the motion on the ground it was untimely. But that simply is not so. The court said it was not persuaded there had been no service, as definitive a ruling as one could ask for.

II

Spencer argues the judgment must be set aside as void. His theory is that not having been served with the complaint, he was never given notice of damages sufficient to support a default judgment. A nice try but unsuccessful. The flaw in this argument is the finding the complaint was served on Spencer. Since the complaint was served on Spencer, we have no occasion to consider his contentions the motion was timely, it was an abuse of discretion to deny relief on the ground of extrinsic fraud or mistake, or the action must be dismissed for failure to make service within three years of filing the complaint or bring the case to trial within five years.[1]

[1] Spencer moves for judicial notice of copies of internet address searches for himself and other defendants in this action, conducted in 2009. There is no showing this was admitted in evidence below, so the motion for judicial notice filed April 1, 2009 is denied.

Since the evidence supports the finding the summons and complaint were served on Spencer, the order denying the motion to set aside the judgment must be affirmed. Respondent not having filed a brief, there are no costs on appeal to award.

BEDSWORTH, J.

WE CONCUR:

SILLS, P. J.

FYBEL, J.